Sentoria Borneo Land Sdn Bhd v Hwong Hoe Hing & Ors

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24–104–12 OF 2023 (HC4)
LEONARD SHIM J
7 NOVEMBER 2024

Civil Procedure — Preliminary objection — Mode of application — Developer of housing development challenged awards given by Tribunal for Housing Purchaser Claims Sarawak by seeking declaration that Tribunal had no jurisdiction to hear purchasers' claims for liquidated ascertained damages — Whether Tribunal's awards could only be challenged by way of judicial review — Sarawak Housing Development (Control and Licensing) Ordinance 2013 ss 49 and 52(1)

The plaintiff was the developer of a housing development known as Ataria Resort ('the said project') whilst the defendants were the purchasers of the housing units in the said project pursuant to sale and purchase agreements ('the SPAs') between the parties. The said project was 95% completed and the occupation permit had not been issued and vacant possession had not been delivered to the defendants up until the date of the present originating summons. As such, the defect liability period had yet to run. However, the defendants had filed their claims for liquidated ascertained damages ('LAD') before the Tribunal for Housing Purchaser Claims Sarawak ('the Tribunal/the intervener'). These claims were allowed ('the Tribunal awards'), hence, the present action ('encl 1') by the plaintiff for a declaration that the Tribunal had no jurisdiction to hear the 36 cases listed in prayer 1 of encl 1 and thus the Tribunal awards in the said cases were null and void and to be aside. The plaintiff argued that pursuant to s 42(3) of the Sarawak Housing Development (Control and Licensing) Ordinance, 2013 ('the said Ordinance') read together with s 43(2) of the said Ordinance, the Tribunal was only clothed with jurisdiction to hear the claim for LAD upon the issuance of occupation permit and the delivery of vacant possession. The intervener, the first group of the defendants (the eighth, ninth and 11th defendants), and the second group of the defendants (the first, second, third, fifth, tenth, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th and 47th defendants) had raised a preliminary objection that the proper mode of commencement of proceedings to challenge the Tribunal awards was by way of judicial review ('the preliminary objection').

Held, dismissing encl 1 with costs of RM2,000 to each of the first group of the defendants, the second group of the defendants, and the intervener (totalling RM6,000) to be paid by the plaintiff subject to allocatur fee:

(1) Under s 52(1) of the said Ordinance, every award made by the Tribunal under s 49 shall be deemed to be an order of a magistrate's court or a sessions court, as the case may be, and be enforced by any party to the proceedings, as such, in the event that the award was made in breach of statute and/or made without jurisdiction, it may be declared void and set aside or impeached in any proceedings brought for that purpose. Whether or not the plaintiff could succeed in such proceedings would depend on the facts, evidence and the applicable law. The plaintiff was not restricted to applying for a judicial review for the purpose of challenging or setting aside the Tribunal awards. In the premises, the preliminary objection was disallowed (see paras 25–26).

(2) There was nothing in ss 42, 43(1) and (2) of the said Ordinance which stated that the Tribunal had no jurisdiction to decide on the defendants' claims and to make the awards or that the purchaser/defendants must wait until the occupation permits were issued and the delivery of the vacant possession of the units before the defendants could claim for LAD. Further, it was not disputed that the defendants' claim for LAD was based on a cause of action arising from the SPAs. The court could not read more into ss 42 and 43 than what was written and intended by the legislature (see paras 29 & 31–32).

(3) The words in s 42(3) of the said Ordinance was clear and unambiguous. An ordinary or literal interpretation of s 42(3) revealed that a claim for LAD could be filed at any time and not later than 18 months from issuance of occupation permit or expiry of the defect liability period, whichever was the later. There was no requirement for the purchaser to wait until the issuance of occupation permit or delivery of vacant possession or expiry of the defect liability period before a claim for LAD could be made to the Tribunal (see para 37).

(4) Clause 23(2) of the SPAs provided that 'If the vendor fails to deliver vacant possession of the said parcel in the manner stipulated in sub-clause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of eight per centum ...'. In the present case, it was not disputed that the plaintiff had failed to deliver vacant possession to the purchasers and the 36 months period for handing over of vacant possession had lapsed. A claim for LAD was recognised even without the delivery of vacant possession to the purchaser. Furthermore, there was nothing in ss 42 and 43 of the said Ordinance that restricted the intervener from hearing claims for LAD before issuance of an occupation permit or before the setting of defect liability period (see paras 39 & 47).

(5) There was merit in the intervener's submission that requiring both an occupation permit and vacant possession before awarding LAD would unjustly penalise purchasers for developers' delays, contradicting the

protective aims of the said Ordinance. Therefore, the court adopted a liberal and purposive approach when interpreting ss 42 and 43 of the said Ordinance in relation to the intervener's jurisdiction (see para 50).

(6) There was merit in the second group of defendants' submission that the failure of the plaintiff to give any credible assurance or evidence as to when the units would be completed amounted to a renunciation or abandonment of the SPAs and a fundamental breach of contract. To interpret ss 42 and 43 of the said Ordinance and cl 23(3) of the SPAs otherwise would lead to absurdity and was contrary to the intention of the legislature in enacting the said Ordinance to protect the innocent purchasers from the hardship and consequences of failure of the developer to deliver vacant possession or abandonment of the housing project (see para 59).

(7) In the final analysis and for the foregoing reasons, the court found that the Tribunal had jurisdiction to hear the defendants' claims for LAD and to make the Tribunal awards and the defendants' claim for LAD was not premature. Hence, the Tribunal awards were valid and binding on the parties thereto (see para 60).

[Bahasa Malaysia summary

Plaintif merupakan pemaju bagi satu pembangunan perumahan yang dikenali sebagai Ataria Resort ('projek tersebut') manakala defendan-defendan adalah pembeli-pembeli unit rumah dalam projek tersebut berdasarkan perjanjian-perjanjian jual beli ('SPAs tersebut') antara pihak-pihak. Projek tersebut telah 95% siap dan permit pendudukan belum dikeluarkan dan milikan kosong belum diserahkan kepada defendan-defendan sehingga tarikh saman pemula semasa. Oleh itu, tempoh tanggungan cacat masih belum berjalan. Bagaimanapun, defendan-defendan telah memfailkan tuntutan mereka untuk ganti rugi tertentu dan ditetapkan ('LAD') di hadapan Tribunal Tuntutan Pembeli Perumahan Sarawak ('Tribunal/pencelah tersebut'). Tuntutan ini dibenarkan ('award Tribunal tersebut'), oleh itu, tindakan semasa ('lampiran 1') telah difailkan oleh plaintif untuk pengisytiharan bahawa Tribunal tersebut tidak mempunyai bidang kuasa untuk mendengar 36 kes yang disenaraikan dalam permohonan 1 lampiran 1 dan dengan itu award Tribunal dalam kes-kes tersebut adalah batal dan tidak sah dan harus diketepikan. Plaintif berhujah bahawa menurut s 42(3) Ordinan Pemajuan Perumahan (Kawalan dan Pelesenan) 2013, Sarawak ('Ordinan tersebut') dibaca bersama s 43(2) Ordinan tersebut, Tribunal tersebut hanya mempunyai bidang kuasa untuk mendengar tuntutan LAD setelah permit pendudukan dikeluarkan dan setelah milikan kosong diserahkan. Pencelah, kumpulan pertama defendan (defendan kelapan, kesembilan dan ke-11), dan kumpulan kedua defendan (defendan pertama, kedua, ketiga, kelima, kesepuluh, ke-17, ke-18, ke-19, ke-20, ke-21, ke-22, ke-23, ke-24, ke-25, ke-26, ke-27, ke-28, ke-30, ke-31, ke-32, ke-33, ke-34, ke-35, ke-36, ke-37, ke-38, ke-39, ke-40,

ke-41, ke-42, ke-43, ke-44, ke-45 dan ke-47) telah membangkitkan bantahan awal bahawa mod permulaan prosiding yang betul bagi mencabar award Tribunal tersebut adalah melalui semakan kehakiman ('bantahan awal tersebut').

Diputuskan, menolak lampiran 1 dengan kos sebanyak RM2,000 kepada kumpulan pertama defendan, kumpulan kedua defendan, dan pencelah (dengan jumlah keseluruhan sebanyak RM6,000) yang perlu dibayar oleh plaintif tertakluk kepada fi alokatur:

(1) Di bawah s 52(1) Ordinan tersebut, setiap award yang dibuat oleh Tribunal tersebut di bawah s 49 hendaklah disifatkan sebagai perintah mahkamah majistret atau mahkamah sesyen, mengikut mana-mana yang berkenaan, dan dikuatkuasakan oleh mana-mana pihak dalam prosiding tersebut, oleh itu, sekiranya award tersebut dibuat dengan melanggar undang-undang dan/atau dibuat tanpa bidang kuasa, ia boleh diisytiharkan terbatal dan diketepikan atau dicabar di dalam apa-apa prosiding yang difailkan bagi tujuan tersebut. Sama ada plaintif boleh berjaya atau tidak dalam prosiding tersebut bergantung kepada fakta, keterangan dan undang-undang yang terpakai. Plaintif tidak dihadkan untuk memohon semakan kehakiman sahaja bagi tujuan mencabar atau mengenepikan award Tribunal tersebut. Berdasarkan alasan-alasan di atas, bantahan awal tersebut tidak dibenarkan (lihat perenggan 25–26).

(2) Tiada apa-apa dalam ss 42, 43(1) dan (2) Ordinan tersebut yang menyatakan bahawa Tribunal tersebut tidak mempunyai bidang kuasa untuk memutuskan tuntutan defendan-defendan dan membuat award tersebut atau bahawa pembeli/defendan-defendan mesti menunggu sehingga permit pendudukan dikeluarkan dan serahan milikan kosong unit-unit tersebut sebelum defendan-defendan boleh menuntut LAD. Selanjutnya, tidak dipertikaikan bahawa tuntutan defendan-defendan untuk LAD adalah berdasarkan kausa tindakan yang timbul daripada SPAs tersebut. Mahkamah tidak boleh membaca lebih banyak ke dalam ss 42 dan 43 daripada apa yang ditulis dan dihasratkan oleh badan perundangan (lihat perenggan 29 & 31–32).

(3) Perkataan-perkataan dalam s 42(3) Ordinan tersebut adalah jelas dan tidak samar-samar. Tafsiran biasa atau literal s 42(3) mendedahkan bahawa tuntutan untuk LAD boleh difailkan pada bila-bila masa dan tidak lewat daripada 18 bulan dari pengeluaran permit pendudukan atau tamat tempoh tanggungan cacat, yang mana terkemudian. Tiada keperluan untuk pembeli menunggu sehingga pengeluaran permit pendudukan atau serahan milikan kosong atau tamat tempoh tanggungan cacat sebelum tuntutan LAD boleh dibuat kepada Tribunal tersebut (lihat perenggan 37).

(4) Klausa 23(2) SPAs tersebut menyatakan bahawa 'If the vendor fails to

deliver vacant possession of the said Parcel in the manner stipulated in sub-clause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of eight per centum ...'. Dalam kes semasa, tidak dipertikaikan bahawa plaintif telah gagal menyerahkan milikan kosong kepada pembeli-pembeli dan tempoh 36 bulan untuk penyerahan milikan kosong telah luput. Tuntutan untuk LAD diiktiraf walaupun tanpa penyerahan milikan kosong kepada pembeli. Tambahan pula, tiada apa-apa dalam ss 42 dan 43 Ordinan tersebut yang menyekat pencelah daripada mendengar tuntutan LAD sebelum pengeluaran permit pendudukan atau sebelum penamatan tempoh tanggungan cacat (lihat perenggan 39 & 47).

(5) Terdapat merit dalam penghujahan pencelah bahawa menghendaki kedua-dua permit pendudukan dan milikan kosong sebelum pemberian LAD akan menghukum pembeli-pembeli secara tidak adil di atas kelewatan pemaju, yang mana ini bercanggah dengan matlamat Ordinan tersebut untuk melindungi pembeli. Oleh itu, mahkamah menggunakan pendekatan liberal dan bertujuan apabila mentafsir ss 42 dan 43 Ordinan tersebut berhubung dengan bidang kuasa pencelah (lihat perenggan 50).

(6) Terdapat merit dalam penghujahan kumpulan kedua defendan bahawa kegagalan plaintif untuk memberikan apa-apa jaminan atau keterangan yang boleh dipercayai tentang bila unit-unit tersebut akan disiapkan adalah terjumlah kepada penolakan atau pengabaian SPAs tersebut dan pelanggaran kontrak yang serius. Pentafsiran yang sebaliknya ke atas ss 42 dan 43 Ordinan tersebut dan klausa 23(3) SPAs tersebut akan membawa kepada sesuatu yang tidak masuk akal dan bertentangan dengan niat badan perundangan dalam menggubal Ordinan tersebut untuk melindungi pembeli-pembeli yang tidak bersalah daripada kesusahan dan akibat kegagalan pemaju untuk menyerahkan milikan kosong atau pengabaian projek perumahan yang berkaitan (lihat perenggan 59).

(7) Dalam analisis akhir dan atas sebab-sebab yang dinyatakan di atas, mahkamah mendapati bahawa Tribunal tersebut mempunyai bidang kuasa untuk mendengar tuntutan defendan-defendan untuk LAD dan untuk membuat award Tribunal tersebut dan tuntutan defendan-defendan untuk LAD bukanlah tuntutan yang pramatang. Oleh itu, award Tribunal tersebut adalah sah dan mengikat pihak-pihak kepadanya (lihat perenggan 60).]

Cases referred to

ABT Construction Sdn Bhd & Anor v Tribunal Tuntutan Pembeli Rumah & Ors [2013] 9 MLJ 193, HC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan

Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)
Bahamas International Trust Co Ltd and another v Threadgold [1974] 1 WLR 1514, HL (refd)
Charles Anthony Santiago v Suruhanjaya Pilihan Raya, Malaysia & Anor [2014] 7 MLJ 271; [2013] 6 CLJ 154, HC (refd)
Chin Kok Woo & Ors (suing in their personal capacity and representing 19 resident unit buyers in the mixed development project known as 'SkyPark @ Cyberjaya') v Sky Park Properties Sdn Bhd & Ors [2022] 10 MLJ 153, HC (distd)
Chow Tat Chow & Anor v Mammoth Empire Land Sdn Bhd [2022] 7 MLJ 849; [2021] 1 LNS 2142, HC (refd)
City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69, PC (refd)
Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)
Kang Yoon Mook Xavier v Insun Development Sdn Bhd [1995] 2 MLJ 91, HC (refd)
Khairul Izman Kamal v Lembaga Jurutera Malaysia [2023] MLJU 114, HC (refd)
O'Reilly v Mackman and others and other cases [1982] 3 All ER 1124, HL (refd)
Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor v Ann Joo Steel Sdn Bhd and another appeal [2017] 6 MLJ 397, CA (refd)
PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60, FC (refd)
Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia [2009] 1 MLJ 676, CA (refd)
Sea Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, FC (refd)
Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852; [2008] 4 CLJ 618, CA (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd) [2005] 4 MLJ 101, CA (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317, CA (refd)
Tan Yang Long & Anor v Newacres Sdn Bhd [1992] 1 MLJ 289, HC (refd)
Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd and other appeals [2004] 3 MLJ 17, CA (refd)
United Plumbing and Sanitation Sdn Bhd v Taman Ratu Sdn Bhd and another application [2025] 7 MLJ 544; [2024] CLJU 1179, HC (distd)

Legislation referred to

Housing Development (Control and Licensing) Ordinance 2013 (Cap 69) ss 42, 42(3), 43, 43(1), (2), 49, 52(1)
Rules of Court 2012 O 1A, O 2 r 1, O 53, O 53 r 3(6)

Wong King Wei (King Wei, Jacey Wong & Partners) for the plaintiff.
Paul Tang (with Rodney Voon and Pamela Bong) (Tan, Yap & Tang) for the defendants.
Syed Rezif Afham bin Wan Alwi (State Attorney General's Chambers) for the defendants.
Satinder Singh Sandhu (with Kalveet Singh Sandhu and Mekanda Singh Sandhu) (Sandhu & Co) for the defendants.
Voon Lee Shan (Voon & Co) for the defendants.

Leonard Shim J:

INTRODUCTION

[1] There are two matters fixed for hearing before the court. Enclosure 1 is an action for a declaration that the Tribunal for Housing Purchaser Claims Sarawak ('the Tribunal') has no jurisdiction to hear the 36 cases listed in prayer 1 of encl 1 and thus the Tribunal awards in the said cases are null and void and to be set aside.

[2] Enclosure 4 is an application by the plaintiff for a stay of the Tribunal awards pending the final disposal of encl 1 and its subsequent appeal, if any. In para 24 of the plaintiff's submission in reply, encl 95, the plaintiff submitted that encl 4 is already rendered redundant because the court had already in the process of hearing the main action (which is fixed for decision), hence, such interim stay is no longer necessary. It appears that the plaintiff has abandoned the application for an interim stay in encl 4 and the only matter for the court to determine is the main action, encl 1.

[3] The main ground for the plaintiff's action for declaration in encl 1 is that pursuant to s 42(3) of the Sarawak Housing Development (Control and Licensing) Ordinance 2013 ('the said Ordinance') read together with s 43(2) of the said Ordinance, the Tribunal is only clothed with jurisdiction to hear the claim for liquidated ascertained damages ('LAD') upon the issuance of occupation permit and the delivery of vacant possession.

SALIENT FACTS

[4] The plaintiff is the developer of a housing development project known as Ataria Resort ('the said project') at Lot 8581 (Parent Lot 8110) and part of Lot 7686, Block 9, Salak Land District at Bandar Baru Samariang, Jalan Sultan Tengah, Kuching.

[5] The plaintiff had entered into separate sale and purchase agreements with the respective defendants where the plaintiff is the vendor and the

respective defendants are the purchasers of their respective units in the project ('the SPAs'). A

[6] The project was 95% completed and the occupation permit has not been issued and vacant possession has not been delivered to the defendants up until the date of this originating summons. As such, the defect liability period has yet to run. B

[7] The defendants have respectively filed their claims for LAD before the Tribunal/intervener between the period of year 2020 to 2023. C

[8] The intervener has heard the claims filed and granted the Tribunal awards for LAD to the respective defendants between the period of year 2020 to 2023.

CONTENTION OF THE PARTIES D

[9] In summary, the plaintiff contends that by reading s 42(3) of the said Ordinance together with s 43(2) of the same ordinance and cl 23(3) of the SPAs, the Tribunal/intervener shall only assume the jurisdiction to hear the defendants' claims for LAD which is based on the causes of action arising from the SPAs: E

(a) after the occupation permit has been issued or after the defect liability period as set out in the SPAs has started to run, whichever is later; and

(b) when the defendants take vacant possession of their respective parcels. F

[10] The plaintiff relied on *Chin Kok Woo & Ors (suing in their personal capacity and representing 19 resident unit buyers in the mixed development project known as 'SkyPark @ Cyberjaya') v Sky Park Properties Sdn Bhd & Ors* [2022] 10 MLJ 153 and *United Plumbing and Sanitation Sdn Bhd v Taman Ratu Sdn Bhd and another application* [2025] 7 MLJ 544; [2024] CLJU 1179 (HC) to support their contention. G

[11] The plaintiff contends that the project was at 95% completion and the occupation permit in respect of the defendant's respective parcels has yet to be issued and the vacant possession of the defendants' respective parcels has yet to be delivered to the defendants. Additionally, the defect liability period as set out in the SPAs has yet to run. As such, the defendants' claim for LAD is premature due to the reason that there is no actual accrual of action. H I

[12] Due to the aforesaid reasons, the plaintiff contends that the intervener has no jurisdiction to hear the defendants' claim for LAD and has no jurisdiction to grant the Tribunal awards for LAD to the defendants.

[13] Thus, the plaintiff submits that the Tribunal awards for LAD granted by the intervener are in breach of ss 42 and 43 of the said Ordinance and illegal, null and void and ought to be set aside by this court. The plaintiff relied on the principle in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC) and *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37 (FC) and followed in *Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor v Ann Joo Steel Sdn Bhd and another appeal* [2017] 6 MLJ 397 (CA) to support their argument.

[14] The eighth, ninth and 11th defendants (the first group of defendants) contend that this action is an abuse of process because the action relates to the decision of the public authority and only can be challenged by way of judicial review. See: (a) *Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia* [2009] 1 MLJ 676 (CA); (b) *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; (c) *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124; and (d) *Khairul Izman Kamal v Lembaga Jurutera Malaysia* [2023] MLJU 114.

[15] The first group of defendants submitted that since the housing Tribunal is exercising a statutory right, the correct procedure should be to commence a judicial challenge by way of judicial review under O 53 of the ROC 2012 and such non-compliance is not curable by way of O 1A and/or O 2 r 1 of the ROC 2012. See *Charles Anthony Santiago v Suruhanjaya Pilihan Raya, Malaysia & Anor* [2014] 7 MLJ 271; [2013] 6 CLJ 154 (HC).

[16] The first, second, third, fifth, tenth, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th and 47th defendants (the second group of defendants) contend that nothing in ss 42 and 43(1) and (2) of the said Ordinance states that the Tribunal has no jurisdiction to decide on the defendants' claims and to make awards because the defendants have to wait until the occupation permits of the units are issued and the delivery of the vacant possession of the units before the defendants can claim for LAD or have the right to claim for LAD. The second group of defendants submit that the court cannot read more into ss 42 and 43 of the said Ordinance than what is written and intended by the Legislature. See *Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd and other appeals* [2004] 3 MLJ 17 (CA).

[17] The second group of defendants relying on *Bahamas International Trust Co Ltd and another v Threadgold* [1974] 1 WLR 1514 and *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101 submitted that construction/interpretation of the written document is a question of law for the court to decide and not for any

parties to the suit. Therefore, the Tribunal alone is to decide on the construction/interpretation of cll 23(1), (2) and (3). It is not for the plaintiff to now come before this court to complain that the Tribunal had no jurisdiction to hear the claims for LAD until the issuance of the occupation permit.

[18] The second group of defendants further submitted that the failure of the plaintiff to give any credible assurance or evidence as to when the units would be completed tantamounted to a renunciation or abandonment of the SPAs which entitled the defendants to claim for LAD against the plaintiff. See *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 289 (HC) and *Kang Yoon Mook Xavier v Insun Development Sdn Bhd* [1995] 2 MLJ 91 (HC).

[19] The sixth, seventh, 12th, 13th, 14th, 15th and 16th defendants (the third group of defendants) has conceded to the plaintiff's action and had not filed any affidavit in opposition and submission.

[20] The 46th defendant had made appearance but he did not file any submission to oppose the plaintiff's application to set aside the Tribunal awards granted by the intervener.

[21] The intervener raised a preliminary objection and contends that the plaintiff in challenging the awards issued by the intervener, employed an incorrect mode of commencement. The intervener contends that the plaintiff ought to have filed an application for judicial review pursuant to O 53 of the ROC 2012. See *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317.

[22] By virtue of O 53 r 3(6) of the ROC 2012, the plaintiff had failed to commence legal action under a proper mode and within the prescribed time of three months. Therefore, the intervener submitted that the plaintiff's present application by way of originating summons is unsustainable and/or otherwise is an abuse of the court process and ought to be dismissed by the court.

[23] The intervener submit that should s 42(3) and s 43(2) be construed in the manner proposed by the plaintiff, then it would imply that all claims would be put on hold until both occupation permit is issued and vacant possession is delivered to file any claims which may cause delay in filing of claims for issues that arise earlier, potentially causing claimants to file out of time and lose their rights to seek legal redress.

EVALUATION AND FINDINGS

[24] The intervener raised a preliminary objection to this action on the ground that the Tribunal was exercising a statutory function and duty in

hearing and making the Tribunal awards and the defendants are exercising a statutory right in bringing their claim for LAD to the Tribunal. Thus, the intervener contend that the proper mode of commencement of proceedings to challenge the Tribunal awards is by way of judicial review. The first and second group of defendants also raised similar arguments in their respective submissions.

[25] A careful perusal of the originating summons (encl 1) shows that the plaintiff is seeking to set aside the Tribunal awards on the ground that the same were made in breach of s 42 and s 43 of the said Ordinance and thus, the said Tribunal awards were made without jurisdiction and may therefore be declared void and set aside. Under s 52(1) of the said Ordinance, every award made by the Tribunal under s 49 of the Ordinance shall be deemed to be an order of a magistrate's court or a sessions court, as the case may be, and be enforced by any party to the proceedings.

[26] As the award made by the Tribunal is deemed to be an order of the magistrate's or sessions court and in the event that it was made in breach of statute and/or made without jurisdiction, it may be declared void and set aside or impeached in any proceedings brought for that purpose. In *Eu Finance* above, the Federal Court stated that such order is a nullity and it can be disregarded and impeached in any proceedings before any court or Tribunal and whenever it is relied upon. In other words, it is subject to collateral attack. Thus, the plaintiff may challenge the Tribunal awards in any proceedings brought for the purpose of declaring void and setting aside the said awards. See *Badiaddin* above. Whether or not the plaintiff could succeed in such proceedings would depend on the facts, evidence and the applicable law. The plaintiff is not restricted to applying for a judicial review for the purpose of challenging or setting aside the Tribunal awards. In the premises, the preliminary objection or issue raised by the intervener on the wrong mode of commencement of this action by originating summons is disallowed.

[27] The main issue for determination by the court is whether the Tribunal has no jurisdiction to decide on the defendants' claims for LAD and to make the awards unless and until the occupation permits are issued and delivery of vacant possession of the units has taken place.

[28] The jurisdiction of the Tribunal is clearly stated in s 42 of the said Ordinance which provides as follows:

> 42 (1) Subject to section 43, the Tribunal shall have jurisdiction to hear a claim which does not exceed one hundred and fifty thousand ringgit lodged under section 41.
>
> (2) Any counter-claim arising out of the sale and purchase agreement to be filed

before the Tribunal shall not exceed one hundred and fifty thousand ringgit.

(3) A claim before the Tribunal shall be filed at any time not later than eighteen months from the date of the issuance of the occupation permit or before the expiry date of the defect liability period as set out in the sale and purchase agreement, whichever is later.

(4) Claims may not be split, nor more than one claim be brought, in respect of the same matter against the same party for the purpose of bringing it within the jurisdiction of the Tribunal.

(5) No claim shall be entertained by the Tribunal if there is already a suit filed in any civil court relating to the same issue in dispute.

(6) No proceedings of the Tribunal or award shall be set aside or quashed for want of form.

(7) (a) The Tribunal may during the proceedings of any claim where necessary, give notice to any financial institution or any other third party affected by the claim to be a party to the proceedings.

(b) For the purpose of paragraph (a), the Tribunal shall extend a copy of the claim, defence and a summary of the facts to relevant party.

(c) Upon receipt of the documents in para (b), the financial institution or third party shall within two weeks file their explanation or defence in the Tribunal.

(d) For the purpose of this section, the Tribunal may make an award against the financial institution or the third party.

[29] There is nothing in s 42 which states that the Tribunal has no jurisdiction to decide on the defendants' claims and to make the awards or that the purchaser/defendants must wait until the occupation permits are issued and the delivery of the vacant possession of the units before the defendants can claim for LAD.

[30] In s 43(1), (2) of the said Ordinance, it is clearly provided that the Tribunal has no jurisdiction in respect of the following claims:

43 (1) Except as expressly provided under this Ordinance, the Tribunal shall have no jurisdiction in respect of any claim —

(a) for the recovery of land, or any estate or interest in land;

(b) in which there is dispute concerning —

(i) the entitlement of any person under a will or settlement, or on intestacy (including partial intestacy);

(ii) goodwill;

(iii) any chose in action; or

(iv) trade secret or other intellectual property rights.

A (2) The jurisdiction of the Tribunal shall be limited to a claim by the purchaser that is based on a cause of action arising from a sale and purchase agreement entered into whether or not pursuant to this Ordinance.

B **[31]** Section 43(1) and (2) does not provide that the Tribunal has no jurisdiction to hear the defendants' claims and/or the defendants have to wait until the occupation permits are issued and the delivery of the vacant possession of the units before the defendants can claim for the LAD. Further, it is not disputed that the defendants' claim for LAD is based on a cause of action arising from the SPA's.

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[32] The court cannot read more into ss 42 and 43 than what is written and intended by the Legislature. In *Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd and other appeals* [2004] 3 MLJ 17, the Court of Appeal stated through Richard Malanjum JCA (as His Lordship then was) as follows:

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18 With respect, we find the first assumption to be without any basis. There is nothing in the provisions establishing the Tribunal or related thereto which can be said to support it. In our view while s 16M sets out the general jurisdiction of the Tribunal, it is s 16N and in particular subsection 16N(2) thereof that provides the perimeter of the jurisdiction of the Tribunal. Section 16N(2) reads: limitation of jurisdiction. (1) Except as expressly ... (2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement.

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19 Sub-section 16N(2) does not stipulate a cutoff point by reference to date of agreement vis a vis jurisdiction. All that is required of the Tribunal in assuming jurisdiction to hear a claim presented before it is to verify whether it is within the ambit of sub-s 16N(2), that is to say: (a) whether the claim is based 'on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer; and (b) whether the claim is 'brought by a homebuyer not later than 12 months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement'.

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20 We do not think there should be any additional or prerequisite term to be read into the provision. To do so would tantamount to adding what is not in the statute. And that should not be done since judges are not legislators. That was echoed in *Nkm Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 with these words: It must always be borne in mind that we are judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a court to proceed in a particular course of

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administering justice, was one of substance and not merely of form. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act which it may be called upon to interpret per Seah SCJ at p 39.

21 In fact the need for a sale and purchase agreement as a condition-precedent in filing a claim has also been waived by subsection 16N(3) thereof which states that '(N)otwithstanding sub-s (2) no claim shall be affected or defeated on the ground that no sale and purchase agreement has been entered into between the homebuyer and the licensed housing developer at the time when the cause of action accrues if there exists a previous dealing between the homebuyer and the licensed housing developer in respect of the acquisition of the housing accommodation'.

22 To limit therefore the jurisdiction of the Tribunal to claims based on sale and purchase agreements entered into after the appointed date would tantamount to restricting the jurisdiction of the Tribunal which parliament never intended to do so. It is absurd in our view to say that parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into as recent as the appointed date. Meanwhile, the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which parliament intended to address when it legislated for the establishment of the Tribunal. As stated earlier, being a piece of social legislation a liberal and purposive approach should be adopted when construing the legislative provisions governing the threshold jurisdiction of the Tribunal.

[33] The relevant sections of the said Ordinance reads as follows:

42 Jurisdiction of Tribunal

(3) A claim before the Tribunal shall be filed at any time not later than eighteen months from the date of the issuance of the occupation permit or before the expiry date of the defect liability period as set out in the sale and purchase agreement, whichever is later.

43 Limitation of Jurisdiction

(2) The jurisdiction of the Tribunal shall be limited to a claim by the purchaser that is based on a cause of action arising from a sale and purchase agreement entered into whether or not pursuant to this Ordinance.

[34] The plaintiff contends, inter alia, that: (a) the intervener is only clothed with jurisdiction to hear the claim for liquidated ascertained damages upon the issuance of occupation permit and the delivery of vacant possession; (b) the project was at 95% completion and the occupation permit has not been issued and vacant possession has not been delivered to the defendants.

[35] The intervener contends that the intervener has the jurisdiction to

handle claims filed at any time so long as it is within the timeframe specified (ie within 18 months of the occupation permit issued or before the defect liability period expires) as provided under s 42(3).

[36] The intervener further submit that the intervener's jurisdiction is not limited solely to claims for liquidated ascertained damages ('LAD') that arise only after the issuance of an occupation permit and the delivery of vacant possession. The intervener has the jurisdiction to hear claims relating to any issues in the sale and purchase agreement as provided under s 43(2) of the Ordinance.

[37] The words in s 42(3) is clear and unambiguous. An ordinary or literal interpretation of s 42(3) reveals that a claim before the Tribunal shall be filed 'at any time not later than' 18 months from the date of issuance of the occupation permit or before the expiry date of the defect liability period as set out in the sale and purchase agreement, whichever is later. It provides for a limitation period for the bringing of claims before the Tribunal. Thus, a claim for LAD could be filed at any time and not later than 18 months from issuance of occupation permit or expiry of the defect liability period, whichever is the later. There is no requirement for the purchaser to wait until the issuance of occupation permit or delivery of vacant possession or expiry of the defect liability period before a claim for LAD can be made to the Tribunal.

[38] The plaintiff contends that the cause of action to claim LAD by the purchaser should accrue upon issuance of the occupation permit and the purchaser had taken possession of his unit. The plaintiff relied on cl 23(3) of the SPAs which reads as follows:

> For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

[39] However, cl 23(2) provides that 'If the vendor fails to deliver vacant possession of the said Parcel in the manner stipulated in sub-clause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of eight per centum ...'. In *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852; [2008] 4 CLJ 618, the Court of Appeal held:

> (5) Once the date for delivery of vacant possession passed, the appellants' liability to pay liquidated damages in accordance with the formula provided became immediate. No question of time being at large arose ...
>
> (6) ... The respondents in the cross appeal were entitled to continue to claim liquidated damages until they took possession of their keys to their respective apartments ...

[40] At the outset, it is not disputed here that the intervener is established under the Ordinance to specifically address claims by purchasers, and that the intervener's jurisdiction is rooted in ss 42 and 43 of the Ordinance.

[41] It is observed in the case laws set out hereinafter that courts are inclined to adopt a broader interpretation of the intervener's jurisdiction when it comes to protecting the rights of the purchasers.

ABT Construction Sdn Bhd & Anor v Tribunal Tuntutan Pembeli Rumah & Ors [2013] 9 MLJ 193 at p 207:

> [28] It must be stressed that the Tribunal was established under the HDA to deal specifically with claims lodged by a homebuyer. That was the primary source of jurisdiction of the Tribunal — a claim lodged by a house buyer under s 16L of the HDA and s 16M of the HDA. In s 16A it was provided that a 'homebuyer' meant a purchaser and read together with the definition of' purchasers' in s 3 of the HDA it was 'any person who purchased housing accommodation or ...'.
>
> This avenue for remedy, statutorily provided to a homebuyer, for an expeditious resolution of claims arising from a sale and purchase agreement entered into with persons engaged in housing development, provided claims did not exceed RM50,000 (now), should not be allowed to be defeated merely because the party involved in the housing development, by choice, was not a licensed housing developer.
>
> [30] Accordingly it was my view applying the principles outlined above, which called for a purposive approach to be taken by the courts in interpretation of statutory provision, and also following the instructive words of Lord Denning quoted above, that if necessary words have to be read into a statutory provision to prevent it giving rise to an absurd or unjust situation, the phrase 'licensed housing developer' would also include such persons or entities who were required to be licensed under the HDA to undertake housing development but had not done so. In this case, it would include the contractor/vendor, though 'unlicensed' under the HDA. On this score too, it was my conclusion that the decision of the President of the Tribunal to seize jurisdiction and deal with the purchaser's claim was not tainted with illegality or procedural impropriety, as was submitted by counsel for the contractor/vendor.

Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd and other appeals [2004] 3 MLJ 17 at p 25:

> [22] To limit therefore the jurisdiction of the Tribunal to claims based on sale and purchase agreements entered into after the appointed date would tantamount to restricting the jurisdiction of the Tribunal which parliament never intended to do so. It is absurd in our view to say that parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into as recent as the appointed

A date. Meanwhile, the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which parliament intended to address when it legislated for the establishment of the Tribunal. As stated earlier, being a piece of social legislation a liberal and purposive approach should be adopted when construing the legislative provisions governing the threshold jurisdiction of the Tribunal.

[42] In *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162, Tengku Maimun Tuan Mat CJ espoused the principle of construction of housing legislation in Malaysia as follows:

> [40] The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer ...

[43] The intervener submits that the plaintiff ought not to cherry pick ss 42 and 43 of the Ordinance to limit the intervener's jurisdiction to hear a purchaser's claim.

[44] The intervener's jurisdiction to award LAD is not contingent upon the issuance of an occupation permit or the delivery of vacant possession by the plaintiff.

[45] The case of *Chow Tat Chow & Anor v Mammoth Empire Land Sdn Bhd* [2022] 7 MLJ 849; [2021] 1 LNS 2142 reflects the legislative intent to protect purchasers from undue delay of the developer:

> [16] In *Ganda Selat* case, the learned High Court judge held as follows: 'It is of the considered view that the presence of the words 'shall be liable to pay' in sub-cl 26(2) of the SPAs is significant to mean that the defendant's right to be paid LAD is automatic once there is delay by the developer/vendor to hand over vacant possession to the defendants as purchasers of the units'.
>
> On a proper construction of cl 26(2) of the SPAs it is clear that a housing developer is immediately liable to a purchaser in liquidated damages once the date of completion passes.
>
> ... The courts have recognised the claim for LAD even without the delivery of vacant possession to the purchasers,
>
> Before this court, there is no evidence proffered by the plaintiff (developer) to show or justify why the plaintiff fails to complete the project. All the respective SPAs are now incapable of performance through no fault of the defendants (purchasers). The plaintiff is the defaulting party herein who has breached the SPAs entered with the defendants in failing to complete the project within 36 months stipulated period. To allow the plaintiff to use cl 26(3) of the SAPs in that no vacant possession has

taken place and that therefore the defendants are not entitled to LAD as yet, would be absurd and contrary to cl 26(2) of the SPAs and will cause injustice to the defendants ...

[46] In *Sentul Raya Sdn Bhd* the Court of Appeal held:

(19) ... This is evident in the language of cl 22(2). On its proper construction the clause makes a housing developer immediately liable to a purchaser in liquidated damages once the date of completion passed.

[47] In this present case, it is not disputed that the plaintiff had failed to deliver vacant possession to the purchasers and the 36 months period for handing over of vacant possession has lapsed. A claim for LAD is recognised even without the delivery of vacant possession to the purchaser. See *Chow Tat Chow* above. Furthermore, there is nothing in ss 42 and 43 of the Ordinance that restricts the Intervener from hearing claims for LAD before issuance of an occupation permit or before the setting of defect liability period.

[48] The plaintiff argues that ss 42 and 43 of the Ordinance should be read conjunctively, asserting that the Intervener can only hear and award liquidated damages when the occupation permit has been issued and vacant possession is delivered.

[49] The plaintiff's reading would undermine the protective purpose of the Ordinance. In *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60, at p 77 the court held that:

(3) The HDA and its subsidiary legislation were social legislation enacted for the protection of buyers. In interpreting social legislation, the State having statutorily intervened. the courts had to give effect to the intention of Parliament and not to the intention of the parties. Otherwise, the Legislature's attempt to level the playing field by mitigating the inequality in bargaining power would be rendered nugatory and illusory. Even where a term or provision in a social Legislation or statutory contract enacted thereunder was literally clear or unambiguous the court was obliged to ensure that the term or provision was interpreted in a way which ensured maximum protection of the class in whose favour the social legislation was enacted ...

[50] From the above, there is merit in the intervener's submission that requiring both an occupation permit and vacant possession before awarding LAD would unjustly penalise purchasers for developers' delays, contradicting the protective aims of the said Ordinance. Therefore, this court would adopt a liberal and purposive approach to when interpreting the ss 42 and 43 of the said Ordinance in relation to the intervener's jurisdiction. See: *Westcorp Corp* and *Chow Tat Chow* above.

[51] The case of *Chin Kok Woo & Ors (suing in their personal capacity and representing 19 resident unit buyers in the mixed development project known as 'SkyPark @ Cyberjaya') v Sky Park Properties Sdn Bhd & Ors* [2022] 10 MLJ 153 which was cited in para 30 of the plaintiff's submission is distinguishable for the following factors:

(a) there was delivery of vacant possession;

(b) extension of time was obtained by the developer and approved by the housing controller; and

(c) an existence of a settlement agreement between the housing developer and the purchasers.

[52] Similarly, the case of *United Plumbing and Sanitation Sdn Bhd v Taman Ratu Sdn Bhd and another application* [2025] 7 MLJ 544; [2024] CLJU 1179 at para 32 of the plaintiff's submission is distinguishable. The facts therein differ greatly against our present case in that, the developer is prevented from delivering vacant possession to the purchasers due to the occurrence of a landslide. The legal principles applied in those cases depended upon specific factual circumstances which were not present in the case at hand.

[53] The second group of defendants submit that there is no evidence before this court to even remotely show or prove that the units will be completed at anytime in the near future or even in future. There is no evidence before this court to even show any commitment at all as to when the units will be completed with occupation permits. All the units have only been completed to 95% since 2018 or 2019 and there have no further work or construction for the last five to six years. This is shown by the last certificates of work completed which certified that the works were complete up to 95% in 2018 and 2019. The plaintiff did not give any evidence of any entitlement to extension of time under the provision of the S&Ps (cl 24) and therefore, the agreed dates of delivery of vacant possession are the dates set out in the schedule in 2018, 2019 and 2020 as set out in the SPAs.

[54] Other than alleging that the Tribunal has no jurisdiction to hear the defendants' claims for LAD when the occupation permit has yet to be issued and vacant possession has not been delivered, the plaintiff did not and/or failed to state or give any credible assurance or evidence as to when the units would be completed in the affidavit-in-support (encl 2).

[55] The second group of defendants submit that the failure of the plaintiff to give any credible assurance or evidence as to when the units would be completed tantamounted to a renunciation or abandonment of the S&Ps which entitled the defendants to claim for LAD against the plaintiff. In *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 289, the High Court

allowed the plaintiff's claim for liquidated damages despite the defendant did not and failed to complete and deliver the vacant possession of the apartment since 1988. It was held that:

> In this case *Newacres* disregarded the plaintiffs' claims for liquidated damages. I do not need to consider what may have happened if they had paid it from time to time. Time was of the essence. By February 1989 there was a delay of nearly a year. I regard the total failure of Newacres to give any credible assurances as to if and when the project would be completed to amount to a renunciation or abandonment of the agreement. Their conduct amounted to a fundamental breach of contract. *Law Ngei Ung & Anor v Tamansuri Sdn Bhd 3* is very much in point. Mr Tan, who urged everything which could be said for *Newacres*, relied very heavily on *Loh Wai Lian v SEA Housing Corp Sdn Bhd* and particularly on the second para at p 4 as supporting his proposition that the only remedy a purchaser has in these circumstances is a cause of action for liquidated damages, and that in all cases this cause of action does not accrue until the day when vacant possession is delivered because it is only on that day that the single sum to be paid can be ascertained and so only thereby becoming due and be sued for. With respect I am unable to agree that the case supports such a sweeping proposition. The obligation to pay liquidated damages is only one remedy for late delivery which if accepted will be in substitution of all others.

[56] Without any assurance of completion, what the plaintiff is submitting or implying that the plaintiff is protected by cll 23 (2) and (3) of the sales and purchase agreements from having to pay the defendants LAD until the delivery and taking of vacant possession of the units by the defendants. This literally means that the defendants are powerless to claim the LAD in the face of indifference and lack of concern exhibited by the plaintiff by not giving any assurance of completion and delivery of vacant possession with issuance of occupation permits.

[57] The purpose of the enactment of the HDO 2013 is to protect the defendants and purchasers. This is clearly stated by the Privy Council in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 at p 71:

> It is not surprising that the co-operative society rejected a draft building contract which appeared to flout the terms of the Act of 1966 and was inconsistent with the express provisions of the first contract. The appellants argue that the Act of 1966 does not apply where land is sold and is then developed. This argument makes nonsense of an Act which is clearly designed to protect purchasers from developers, and those purchasers need protection whether the sites of houses are sold before or contemporaneously with or after completion of the houses. By the first contract and by the appellants' own nomination of themselves as developers, the appellants became engaged in the business of housing development by agreeing to construct more than four units of housing accommodation in one development with the view of selling the housing accommodation thus constructed. By the first contract and the appellants' own nomination as developers, the appellants sold the sites of the

terrace houses for the land purchase price, agreed to level and clear the sites for the development price and agreed to construct the terrace houses with a view of selling the same to the cooperative society for the construction price.

[58] In *Sea Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31, the FC at p 34 stated:

> With great respect to Mr Chelliah for the developer we do not agree that it is open to the developer to escape liability by inserting cl 32 in the agreement. It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4%pa interest to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act. That was why r 12 was enacted and in particular paras (o) and (r) thereof. With respect we do not agree with Mr Chelliah that it was open to a developer to get round these paragraphs by the inclusion of such a clause as cl 32 in this agreement.

[59] There is merit in the second group of defendants' submission that the failure of the plaintiff to give any credible assurance or evidence as to when the units would be completed amounts to a renunciation or abandonment of the SPAs and a fundamental breach of contract. See *Tan Yang Long* above. To interpret ss 42, 43 and cl 23(3) otherwise would lead to absurdity and is contrary to the intention of the legislature in enacting the said Ordinance to protect the innocent purchasers from the hardship and consequences of failure of the developer to deliver vacant possession or abandonment of the housing project. See *Kang Yoon Mook Xavier v Insun Development Sdn Bhd* [1995] 2 MLJ 91.

CONCLUSION

[60] In the final analysis and for the foregoing reasons, the court finds that the Tribunal has jurisdiction to hear the defendants' claims for LAD and to make the Tribunal awards and the defendants' claim for LAD is not premature. Hence, the Tribunal awards is valid and binding on the parties thereto.

[61] Based on the aforesaid reasons, encl 1 is dismissed with costs in the sum of RM2,000 to each of the first and second group of defendants and the intervener (totaling RM6,000) to be paid by the plaintiff subject to allocatur fee.

[62] As submitted by the plaintiff, encl 4 is redundant and is dismissed with no order as to costs.

Enclosure 1 dismissed with costs of RM2,000 to each of first group of defendants, second group of defendants, and intervener (totalling RM6,000) to be paid by plaintiff subject to allocatur fee.

Reported by Dzulqarnain Ab Fatar